

UNIVERSITY OF BIRMINGHAM

Research at Birmingham

Prosecuting the Leaders: Promises, Politics and Practicalities

Cryer, Robert

DOI:

[10.3249/1868-1581-1-1-cryer](https://doi.org/10.3249/1868-1581-1-1-cryer)

Citation for published version (Harvard):

Cryer, R 2009, 'Prosecuting the Leaders: Promises, Politics and Practicalities', *Gottingen Journal of International Law*, vol. 1, pp. 45-75. <https://doi.org/10.3249/1868-1581-1-1-cryer>

[Link to publication on Research at Birmingham portal](#)

General rights

Unless a licence is specified above, all rights (including copyright and moral rights) in this document are retained by the authors and/or the copyright holders. The express permission of the copyright holder must be obtained for any use of this material other than for purposes permitted by law.

- Users may freely distribute the URL that is used to identify this publication.
- Users may download and/or print one copy of the publication from the University of Birmingham research portal for the purpose of private study or non-commercial research.
- User may use extracts from the document in line with the concept of 'fair dealing' under the Copyright, Designs and Patents Act 1988 (?)
- Users may not further distribute the material nor use it for the purposes of commercial gain.

Where a licence is displayed above, please note the terms and conditions of the licence govern your use of this document.

When citing, please reference the published version.

Take down policy

While the University of Birmingham exercises care and attention in making items available there are rare occasions when an item has been uploaded in error or has been deemed to be commercially or otherwise sensitive.

If you believe that this is the case for this document, please contact UBIRA@lists.bham.ac.uk providing details and we will remove access to the work immediately and investigate.

Prosecuting the Leaders: Promises, Politics and Practicalities

Robert Cryer^{*}

Table of Contents

A. Introduction.....	46
B. International Criminal Law: Is There an Imperative to “Aim High”?.....	48
C. Bringing Leaders to Justice: The Legal Problems	56
I. Principles of Liability	56
II. Command Responsibility.....	57
III. Joint Criminal Enterprise.....	59
D. Co-operation	62
I. Persuading the Perpetrators to Help	62
II. Immunities	63
E. Peace v Justice: The Old, Hard, Chestnut.....	66
F. The Practical Problems	72
I. Prosecution Strategy	72
G. Conclusion	74

^{*} Professor of International and Criminal Law, Birmingham Law School, University of Birmingham, Edgbaston, Birmingham, B15 2TT, UK. Parts of this piece, which were, in an earlier form, presented at the Free University of Berlin at the invitation of Professor Dr. Heike Krieger. My thanks go to Professor Krieger for the invitation, and for her permission to use the working paper that came from that presentation as the basis of this piece.

A. Introduction

Given recent developments in relation to the prosecution of international crimes,¹ it might be thought that one of the last bastions of sovereignty has been breached, and international criminal law has not only entrenched itself in international law. Indeed further to this, it has assumed a supranational position that stands entirely above States, promising justice for all and as a trump card over depredations committed in the name of State sovereignty. After all, Charles Taylor from Liberia is standing trial before the Special Court for Sierra Leone, Slobodan Milošević only escaped judgment by the International Criminal Tribunal for the former Yugoslavia (ICTY) by dying before the end of his trial, Saddam Hussein was prosecuted and sentenced to death before the Iraqi High Tribunal, and Omar al-Bashir has recently been the subject of a request for an arrest warrant from the Prosecutor of the International Criminal Court. Surely international criminal law reaches its iconographic apogee with the prosecution of such leaders,² brought down to size by the majesty of the law (if not the grandeur of the often aseptic courtrooms)?

Of course, in fact, the picture is far more complicated. Although it is too early to come to any judgment on the Taylor case, his appearance before the Special Court was as much a function of States tiring of him continuing to meddle in Liberian politics than a commitment to seeing him stand trial. Milošević was for many years apparently kept beyond the reach of the ICTY for reasons of ensuring peace in former Yugoslavia, then domestic political reasons, and his trial was itself one from which we might admit,³ lessons can be learned.⁴ The trial and punishment of Saddam Hussein is largely seen as having been mishandled, and inconsistent with the relevant

¹ As Ruti Teitel has said: "There have never been more leaders in the dock, or, under the shadow of its threat", *Ruti Teitel*, *The Law and Politics of Contemporary Transitional Justice*, *Cornell International Law Journal* 38 (2005), 837-862, 837.

² See *Maya Steinitz*, *The Milošević Trial-Live: An Iconical Analysis of International Law's Claim to Legitimate Authority*, *Journal of International Criminal Justice* 3 (2005), 103-123, 103; *Martti Koskeniemi*, *Between Impunity and Show Trials*, *Max Planck Yearbook of International Law* 6 (2002), 1-35, 1.

³ The same could well be said of Franjo Tuđman, who managed to avoid indictment for various reasons, until his death, see: *Victor Peskin*, *International Justice in Rwanda and the Balkans: Virtual Trials and the Struggle for State Cooperation* (2008), 118.

⁴ See in general: *Gideon Boas*, *The Milošević Trial: Lessons for the Conduct of Complex International Criminal Proceedings* (2007).

human rights norms,⁵ and possible proceedings against al-Bashir have led to considerable controversy, with the African Union requesting deferral of the International Criminal Court's (ICC) processes relating to him, and the Security Council finding itself somewhat torn on the matter.⁶ As such we must be careful not to present what Georg Schwarzenberger described as the chocolate box version of international law and society.⁷ Some of the difficulties are referable to the nature of the international legal order, some of which are referable, on the other hand, to insalubrious forms of politics. It remains the case that the international legal order is torn between two imperatives, what Hedley Bull would have described as the pluralist and the solidarist views,⁸ and the difference between an international society and an international community.⁹ Nonetheless, some are simply problems of political will, and others are overstated, and the simple fact that it is possible to speak of the problems attending bringing leaders to justice rather than dismissing its possibility is in itself a development from the position soon enough ago that most international criminal lawyers can still remember it.

This piece will seek to explain some of those problems involved in prosecuting leaders (including those of States)¹⁰ and those who, if we agree that we will see it as the general thrust of international criminal law, bear the

⁵ *M. Cherif Bassiouni*, Post Conflict Justice in Iraq: An Appraisal of the Iraq Special Tribunal, *Cornell International Law Journal* 38 (2005), 327-390. 364; *Michael Scharf*, The Iraqi High Tribunal: A Viable Experiment in International Justice?, *Journal of International Criminal Justice* 5 (2007), 258-263, 259; *Miranda Sissons & Ari S. Bassin*, Was the Dujail Trial Fair?, *Journal of International Criminal Justice* 5 (2007), 272-286, 272; *Nehal Bhuta*, Fatal Errors, The Trial and Appeal Judgments in the Dujail Case, *Journal of International Criminal Justice* 6 (2008), 39-65, 39.

⁶ See the African Union Communiqué of the 142nd Peace and Security Council, 21 July 2008 and SC Res. 1828 (31 July 2008) UN Doc S/PV 5947, alongside the statements attending its adoption. See *infra*.

⁷ *Georg Schwarzenberger*, The Misery and Grandeur of International Law, *Current Legal Problems* 17 (1964), 184-210, 185-186.

⁸ For modern expositions see *Barry Buzan*, From International to World Society? English School Theory and the Social Structure of Globalisation (2005), 46-62 and *Nicholas Wheeler*, Saving Strangers: Humanitarian Intervention in International Society (2000), Chapter 1.

⁹ See *Jason Ralph*, Defending the Society of States: Why the US Opposes the International Criminal Court (2007), 13-20.

¹⁰ By which this piece means those who are heads of State, heads of government, or other top-ranking officials (including those at such levels in rebel or cognate movements).

greatest responsibility for international crimes,¹¹ those at the apex of the command structure, in particular, heads of government. In doing so, though, it will do so with an eye to remembering that while international criminal law cannot live up to all its promises, it still keeps at least as many as most leaders do, and they are not the only international criminals deserving of punishment.

B. International Criminal Law: Is There an Imperative to “Aim High”?

International Criminal law, at least in the 20th century, has often looked to prosecute leaders. For example, the 1919 Inter-Allied Commission was empowered to investigate the responsibility of the “authors of the war”.¹² Indeed, the commission suggested that high officials, including the Kaiser, be tried for war crimes, *inter alia* on the basis of command responsibility.¹³ The two major mid-century international criminal tribunals, which form the basis of modern international criminal law, the Nuremberg and Tokyo International Military Tribunals (IMT), were both created for the prosecution of high-ranking offenders.

The Nuremberg IMT was created to implement the Moscow declaration, which promised “the major criminals whose offences have no particular geographical location and [...] will be punished by a joint declaration of the governments of the Allies”.¹⁴ Similarly, Article 1 of the Nuremberg IMT Charter stated that “there shall be established an International Military Tribunal (hereinafter called “the Tribunal”) for the just and prompt trial and punishment of the major war criminals of the European Axis.”¹⁵ Although the Tokyo IMT was created pursuant to the Moscow declaration, which, in the relevant parts, merely promised “stern

¹¹ The ICTY has consistently held that abuse of authority is an aggravating factor, see e.g. *Prosecutor v. Blaškić*, Judgment, IT-96-14-A, 29 July 2004, para.727; *Prosecutor v. Babić*, Judgment, IT-03-72-A, 18 July 2005, para.81.

¹² The Report of the Commission is reprinted in (1920) 14 American Journal of International Law 95-145.

¹³ *Id.*, 116-117 and 121.

¹⁴ Declaration of Moscow, 1 November 1943, available at <http://avalon.law.yale.edu/wwii/moscow.asp> (last visited 8 December 2008).

¹⁵ 1945 Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis Power and Charter of the International Military Tribunal, Art. 1, 82 U.N.T.S. 279.

justice shall be meted out to war criminals”,¹⁶ Article 1 of the Tokyo IMT’s Statute reads “[t]he International Military Tribunal for the Far East is hereby established for the just and prompt trial and punishment of the major war criminals in the Far East.”¹⁷

More recently, although there is no gravity threshold for the jurisdiction of the ICTY and ICTR, they have been required by Security Council Resolution 1534 to focus on “the most senior leaders suspected of being most responsible for crimes” in the Tribunal’s jurisdiction.¹⁸ This is, however more to do with the fact that the Council wishes them to finish up their business quickly than a principled view of the appropriate role of international prosecutions.¹⁹

Similar financial and logistical concerns led the Secretary-General, at the insistence of the Security Council, to provide, in the Statute of the Special Court for Sierra Leone Article 15(1)²⁰ that “[t]he Prosecutor shall be responsible for the investigation and prosecution of persons who bear the greatest responsibility for serious violations of international humanitarian law [...]”.²¹ In the *AFRC* Appeal,²² one defendant, Kanu asserted that this was a jurisdictional requirement, and that the Trial Chamber failed to

¹⁶ Potsdam Declaration, reprinted in *Neil Boister & Robert Cryer* (eds), *Documents on the Tokyo International Military Tribunal: Charter, Indictment and Judgments* (2008) 1, 1-2.

¹⁷ Tokyo IMT Charter, reprinted in *id.*, 7, 7.

¹⁸ *Dominic Raab*, Evaluating the ICTY and Its Completion Strategy, *Journal of International Criminal Justice* 3 (2005) 82-102, 87; *Darryl A. Mundis*, The Judicial Effects of the “Completion Strategies” on the ad hoc International Criminal Tribunals, *American Journal of International Law* 99 (2005) 142-158, 142; *Larry D. Johnson*, Closing an International Criminal Tribunal While Maintaining International Human Rights Standards and Excluding Impunity, *American Journal of International Law* 99 (2005) 158-174, 158.

¹⁹ Equally, the judges had, early in the life of the ICTY, expressed disquiet about the low-level perpetrators being indicted. See *Antonio Cassese*, Judge of the International Criminal Tribunal for former Yugoslavia, in: *Timothy L.H. McCormack and Cheryl Saunders* (eds), *Sir Ninian Stephen: A Tribute* (2007) 192.

²⁰ Available at Official web-site of the Special Court for Sierra Leone: <http://www.scs-sl.org/Documents/scsl-statute.html> (last visited 8 December 2008).

²¹ There is a similar requirement in the Cambodian mixed chambers, see Law on the Establishment of Extraordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes Committed During the Period of Democratic Kampuchea, Art. 1, available at http://www.eccc.gov.kh/english/cabinet/law/4/KR_Law_as_amended_27_Oct_2004_Eng.pdf (last visited 8 December 2008):

²² *Prosecutor v. Brima, Kamara and Kanu*, Judgment, SCSL-04-16-A, 3 March 2008 (AFRC Appeal).

establish that he did bear the greatest responsibility before convicting him.²³ The Appeals Chamber was firm with any such suggestion, stating that

The only workable interpretation of Article 1(1) is that it guides the Prosecutor in his exercise of prosecutorial discretion. That discretion must be exercised in good faith, on the basis of sound professional judgment...it would also be unreasonable and unworkable to suggest that is to be exercised by the Trial Chamber or Appeals Chamber when the at the end of the trial [...] it would be inconceivable that after a long and expensive trial the Trial Chamber could conclude that although the commission of serious crimes has been established beyond reasonable doubt against the accused the indictment ought to be struck out on the ground that it has not been proved that the accused was not one of those who bore the greatest responsibility [...] Kanu's interpretation of Article 1 is a desperate attempt to avoid responsibility for crimes for which he had been found guilty [...] [and is] [...] therefore without any merit.²⁴

Hence, the requirement that the Prosecutor focus on those who are leaders (and thus bear the greatest responsibility) is a guide, not a jurisdictional requirement, as international criminal law cannot provide for acquittals on the basis of relative culpability in the manner which has been suggested. This seems a sensible middle path to draw. As will be returned to later, leaders are not the only people who deserve punishment.

A similar path has been taken in relation to the ICC. The Prosecutor of the ICC has himself said that his focus is not on the "small fry", but on those that bear greatest responsibility for international crimes, and that he will not be concerning himself with lower-level offenders unless perhaps they have committed particularly egregious crimes.²⁵ This is consistent with the fact

²³ *Id.*, paras 272-4 The Trial Chamber's discussion is *Prosecutor v. Brima, Kamara and Kanu*, Judgment, SCSL-04-16-T, 20 June 2007 paras 640-659.

²⁴ *AFRC Appeal*, paras 282-285.

²⁵ Paper on some policy issues before the Office of the Prosecutor, September 2003, available at http://www.icc-cpi.int/library/organs/otp/030905_Policy_Paper.pdf 7 (last visited 8 December 2008).

that the preamble of the Rome Statute of the International Criminal Court²⁶ which states that the Court is for the most serious crimes of concern to the international community of States as a whole, and Article 17(1)(d) of the Statute provides for the inadmissibility of the case when it is not sufficiently grave to justify the use of the Court.²⁷ This was thought by a Pre-Trial Chamber of the ICC to opine that the gravity test needed to be applied against the background of the fact that it applies within the, already serious, class of international crimes over which the ICC has jurisdiction, and therefore a relevant criterion for the gravity determination was whether or not the defendant bore the greatest responsibility, and was therefore (in practice) was in a senior leadership role.²⁸ This was, in part, on the basis of the assumed deterrent value of focusing on such leaders:

In the Chamber's opinion, only by concentrating on this type of individual can the deterrent effects of the activities of the Court be maximised because other senior leaders in similar circumstances will know that solely by doing what they can to prevent the systematic or large-scale commission of crimes within the jurisdiction of the Court can they be sure that they will not be prosecuted by the Court.²⁹

As such, the Trial Chamber sought to make the Prosecutor's (non-binding) policy of going for leaders a binding requirement upon him.³⁰

²⁶ Rome Statute of the International Criminal Court, UN Doc. A/CONF. 183/9 (Rome Statute, Statute).

²⁷ See generally *John T. Holmes*, Complementarity: National Courts *versus* the ICC, in: *Antonio Cassese, Paula Gaeta and John R.W.D. Jones* (eds) *The Rome Statute of the International Criminal Court: A Commentary* (2002), 667. For discussion (and critique) of the early practice of the ICC on point, see *Kevin Jon Heller*, Situational Gravity Under the Rome Statute, in: *Carsten Stahn and Larissa van den Herik* (eds), *Future Directions in International Criminal Justice* (2009) (forthcoming).

²⁸ *Situation in the Democratic Republic of Congo*, Decision on The Prosecutor's Application for Warrants Of Arrest, Article 58, ICC-01/04-196, 10 February 2006, paras 52-55.

²⁹ *Id.*, para.55.

³⁰ *Id.*, para.63. It was on the basis that Bosco Ntaganda was not senior enough that the Pre-Trial Chamber to refuse an arrest warrant, on the basis that the gravity threshold was not reached, *id.*, para.89. Some support for such a position can be found in: *David M. Crane*, White Man's Justice: Applying International Criminal Justice After Regional Third World Conflicts, *Cardozo Law Review* 27 (2005-2006), 1683-1688, 1683- 1684.

This result, and the type of reasoning leading to it, found stern response from the Appeals Chamber. To begin, they determined that it was not for the Pre-Trial Chamber to determine admissibility unless there are specific reasons for doing so.³¹ The additional grounds of gravity created by the Pre-Trial Chamber, however, were the subject of very severe criticism from the Appeal Chamber, probably their greatest ire was directed at the requirement of seniority the Pre-Trial Chamber introduced. Not least they questioned the idea that deterrence ideas led to the requirement that the gravity threshold excluded all others than the most senior leaders:

It may indeed have a deterrent effect if high-ranking leaders who are suspected of being responsible for having committed crimes within the jurisdiction of the Court are brought before the International Criminal Court. But that the deterrent effect is highest if all other categories of perpetrators *cannot* be brought before the Court is difficult to understand. It seems more logical to assume that the deterrent effect of the Court is highest if no category of perpetrators is *per se* excluded from potentially being brought before the Court [...] The imposition of rigid standards primarily based on top seniority may result in neither retribution nor prevention being achieved [...] The predictable exclusion of many perpetrators on the grounds proposed by the Pre-Trial Chamber could severely hamper the preventive, or deterrent, role of the Court which is a cornerstone of the creation of the International Criminal Court, by announcing that any perpetrators other than those at the very top are automatically excluded from the exercise of jurisdiction by the Court.³²

As the Appeals Chamber also noted, provisions such as Article 33 of the Rome Statute (which provides for a limited defence of superior orders), and Article 27, which provides that the Statute “shall apply equally to all

³¹ The examples of situations in which this might be appropriate were “instances where a case is based on the established jurisprudence of the Court, uncontested facts that render a case clearly inadmissible or an ostensible cause impelling the exercise of proprio motu review” *Situation in the Democratic Republic of Congo*, Judgment on the Prosecutor’s Appeal Against the Decision of Pre-Trial Chamber I Entitled Decision on The Prosecutor’s Application for Warrants Of Arrest Article 58, ICC 01/04-169-US-Exp, 13 July 2006, para.52.

³² *Id.*, paras 73-5.

persons without any distinction based on official capacity” imply that the drafters of the Rome Statute did not consider that only the most senior leaders may appear before the Court.³³ As they concluded:

[T]he preamble to the Rome Statute mentions “most serious crimes” but not “most serious perpetrators”. The preamble to the Statute in paragraphs five and six respectively states “perpetrators” and “those responsible for international crimes”. The reference in paragraph five of the Preamble to “perpetrators” is not prefixed by the delineation “most serious” or “most responsible”. Such language does not appear elsewhere in the Statute in relation to the category of perpetrators. Had the drafters of the Statute intended to limit its application to only the most senior leaders of being most responsible they could have done so expressly.³⁴

This seems correct, there are reasons that lower level offenders need punishment. The first of these is quite simple, people at the local, ground, level often see leaders as far away, and want to see the people who turned them from their homes, killed their families, and abused them, prosecuted rather than walking around their home towns. Any reconciliative function that international criminal law can have can be undermined when people are expected to reconcile with their neighbours and erstwhile persecutors on the basis of a trial of someone who sat in the capital.³⁵ It must be remembered that reconciliation is an individual process at least as much as a societal one.³⁶ Next is the problem, for many perpetrators, even those of a fairly high level, who are part of a bureaucratic system dedicated to the commission of international crimes, but who are, in Hannah Arendt’s memorable phrase about Adolf Eichmann, although evildoers, “banal” evildoers,³⁷ who allow themselves to become unthinking cogs in a machine. At least part of the answer to this is that it is important to recapitulate that allowing that to

³³ *Id.*, para 78.

³⁴ *Id.*, para 79.

³⁵ As Catherine MacKinnon has said “to every woman who is raped, the fish who did it is plenty big”, Catherine MacKinnon, *The ICTR’s Legacy on Sexual Violence*, New England Journal of International and Comparative Law 14 (2008), 101-110, 106.

³⁶ See, in part, Arne J Vetlesen, *Evil and Human Agency, Understanding Collective Evildoing* (2005), 272-281.

³⁷ Hannah Arendt, *Eichmann in Jerusalem, A Report on the Banality of Evil* (1994). Although see Jacob Robinson, *And the Crooked Shall be Made Straight* (1965).

occur is, in itself, considerable wrongdoing. The message ought to be brought home, in part through the expressive function of punishment, that such persons are responsible for that wrongdoing, as has been said by Alain Finkelkraut³⁸ and Arne Vetlesen,³⁹ amongst others. This point retains its vitality, in spite of the fact that Arendt was probably wrong in relation to Eichmann himself, who was not the banal, unreflective bureaucrat he was portrayed as by his defence team.⁴⁰

Nonetheless, debate often concentrates on why it is important to prosecute those most responsible, (i.e. those at the highest levels). As was common ground between the Pre-Trial and Appeals Chamber, those at the highest level are in the best place to prevent large scale crimes. In addition, there are important didactic aspects of trying those at the highest level, in particular to demonstrate that no-one is above the law, a point which is a fundamental tenet of the rule of law.⁴¹

If it is a legitimate aim of international trials to tell the story of the conflict,⁴² then trials of those at the highest level are most likely to be able to do so whilst remaining sufficiently linked to the culpability of the particular defendant before the court. This is important, as it is inappropriate, not least as it is (usually) prejudicial to the accused to stray beyond the facts relevant to the charges in the indictment. To do so is also perilous from the point of view of ensuring an expeditious trial for the defendant,⁴³ and risks imposing on a defendant the burden of dealing with issues that do not bear on their personal culpability, or, if not, attempting to write on broader aspects of the relevant conflict without the benefit of argument on both sides. Also on a pragmatic level, one argument for prosecution of those at the highest level of authority is an incapacitative one, in other words that such people are most likely to instigate renewed conflict, and as such are best removed from public life. Although this is a deeply

³⁸ *Alain Finkelkraut*, (Roxanne Lapidus trans.), *Remembering in Vain: The Klaus Barbie Trial and Crimes Against Humanity* (1992).

³⁹ *supra* note 36, *Vetlesen*, Chapter 5.

⁴⁰ *Id.*, Chapter 2,

⁴¹ See e.g. the allusion to this in *Crane*, note 30, 1683.

⁴² *Mark Osiel*, *Mass Atrocity, Collective Memory and the Law* (1997), Introduction, 13; although see *José Alvarez*, *Rush to Closure: Lessons of the Tadić Judgment*, *Michigan Law Review* 96 (1998) 2031-2112, 2044; *José Alvarez*, *Lessons from the Akayesu Judgment*, *International Law Students' Association Journal of International and Comparative Law* 5 (1998-1999) 359-370, 359.

⁴³ A right protected, *inter alia* by Art. 14 (3)(c) of the International Covenant on Civil and Political Rights, 16 December 1966, 999 U.N.T.S., 171, 177.

controversial justification of punishment,⁴⁴ it is one that has some pedigree in international criminal law, if not always its practice.⁴⁵

There is also the matter of the paradox that a person who kills one person is more likely to be prosecuted than one who has killed thousands,⁴⁶ which threatens to undermine some of the other aims of international criminal justice. The fact that prosecutions (frequently in democracies, it must be said) of low ranking officials rather than the devisers of policies that lead to international crimes, have led to critiques of the legitimacy of such prosecutions which, whilst they do not undermine the legality of such trials, do have some effect on their legitimacy.⁴⁷ Hence, although there are questions about precisely how well prosecutions can fulfil all the aims they are said to have,⁴⁸ there is much to be said for those aims, and as such, it is at least as important to prosecute leaders as it is to prosecute others, in spite of the difficulties that attend such prosecutions.

International criminal law, as can be seen, has to take account of the countervailing imperatives that show the necessity of prosecuting those at all levels of responsibility, whilst also encouraging the prosecution of those at the apex of responsibility. The modern International (and internationalised) Criminal Tribunals have dealt with the matter sensibly, noting the imperative of prosecuting those at the highest level possible, whilst ensuring that this does not become a legal requirement that would imply that those who are not at that level do not bear any responsibility. That said, let us move on to the specific difficulties that attend the

⁴⁴ It is even more controversial when the person has not been proved to have committed any such crime, such as those in Guantánamo Bay, see e.g. *Diane Marie Amann*, Guantánamo, *Columbia Journal of Transnational Law* 42 (2003) 263-348, 263.

⁴⁵ For an early assertion of this view at the Tokyo IMT see the Separate Opinion of the Member from the Netherlands, reprinted in *Neil Boister & Robert Cryer* (eds), *supra* note 16, 701.

⁴⁶ The paradox is referred to, with regard to the gallows humour that it has engendered in conflict situations, in *Geoffrey Robertson*, *Crimes Against Humanity: The Search for Global Justice*, 3rd ed. (2006), 372.

⁴⁷ For a forceful discussion of the responsibility of high-ranking members of the Bush administration, and a critique of the limitation of prosecutions to low ranking perpetrators, see e.g. *Jordan J. Paust*, *Beyond The Law: The Bush Administration's Unlawful Responses to the War on Terror* (2007). This type of critique is one with considerable historical pedigree. For one classic of the genre see *Telford Taylor*, *Nuremberg and Vietnam: An American Tragedy* (1970).

⁴⁸ See generally *Robert Cryer, Håkan Friman, Darryl Robinson & Elizabeth Wilmshurst*, *An Introduction to International Criminal Law and Procedure* (2007), Chapter 2.

prosecutions of those at the highest level, and begin with the specific criminal law problems that have to be dealt with when international criminal law engages with such persons.

C. Bringing Leaders to Justice: The Legal Problems

There are a number of legal difficulties with prosecuting leaders; some relate to the criminal law aspects of international criminal law, in particular the principles of liability that are used to link leaders to the physical perpetration of crimes. Others can be found in more general aspects of international law, such as the difficulties of ensuring co-operation in an international legal system that is not especially conducive to ensuring such co-operation, and the immunities that attach to high-level government officials. Let us begin with the former.

I. Principles of Liability

Criminal law is, understandably, focussed primarily on the physical perpetrator of offences, such as the person who pulls the trigger, otherwise administers the fatal blow, or sells drugs to users. However, as William Schabas has noted, international criminal law tends to have a greater focus on those who are not direct perpetrators in this manner, but those who lead, order or permit offences from on high.⁴⁹ However, this is by no means a simple matter: for the most part, leaders are far away from the actual offences, and pursuant to policies of plausible deniability tend not to write their orders down, but let others know their wishes in less permanent manners. Nazi Germany and (at times) Saddam Hussein's Ba'ath regime were exceptions in this regard. Most leaders do not seek to sully themselves with either direct perpetration of crimes, or evidence of their ordering of such offences. For similar reasons, they also are often careful not to provide clear evidence of their acquiescence in them (or ensure that any such

⁴⁹ William A. Schabas, *Enforcing International Humanitarian Law: Prosecuting the Accomplices*, *International Review of the Red Cross* 842 (2001), 439-458, 440. Although in certain civil law systems, the *Hintermann* idea is used to consider the director of offences committed by others to be perpetrators: Claus Kreß, Claus Roxin's *Lehre von der Organisationsherrschaft und das Völkerstrafrecht*, in: Goldammer's *Archiv für Strafrecht* (2006) 304. The recent development of co-perpetration in the ICC appears to reflect something of this, see: e.g. Thomas Weigend, *Intent, Mistake of Law, and Co-perpetration in the Lubanga Decision on Confirmation of Charges*, *Journal of International Criminal Justice* 6 (2008), 471-487.

evidence is destroyed before it can be brought to the attention of international prosecutors).⁵⁰ High level international criminals are rarely stupid, naïve or unintelligent: demagogues without intellect do not frequently last long enough for liability to attach to them, those that last longer are usually perfectly aware of the mechanisms by which they may plausibly deny international crimes.

Therefore for the vast majority of cases against high level perpetrators, as the Prosecution found in the *Milošević* case, a considerable evidential hurdle has to be overcome to link those in lofty positions to the offences committed on the ground. This issue was precisely what split the Majority and Judge Pal (and, on occasion, Judge Röling) at the Tokyo IMT.⁵¹ As a result of this difficulty, two doctrines have been developed that seek, in addition to reflecting the way in which collective action crimes, which many if not most international crimes are, tend to be committed: Command (Superior) Responsibility and Joint Criminal Enterprise.⁵² Neither is uncontroversial.

II. Command Responsibility

Command responsibility is the liability that attaches to those in a position to prevent or punish international crimes committed by their subordinates. It applies to both civilian and military superiors.⁵³ It is reasonably well explained for present purposes by Article 7(3) of the International Criminal Tribunal for the former Yugoslavia (ICTY) Statute.

⁵⁰ This includes witness evidence, as the killing of possible witnesses, including perpetrator-witnesses has not proved uncommon.

⁵¹ See *Neil Boister & Robert Cryer*, *The Tokyo International Military Tribunal: A Reappraisal*, (2008) Chapters 7-8.

⁵² The literature on both is huge, for a sample see: *Albin Eser*, Individual Criminal Responsibility, in: *Antonio Cassese et al.* (eds), *Commentary on The Rome Statute of the International Criminal Court* (2002), 767; *Mark Osiel*, The Banality of Good: Aligning Incentives Against Mass Atrocity (The Banality of Good), *Columbia Law Review*, 105 (2005), 1751-1862; *Elies van Sliedregt*, The Criminal Responsibility of Individuals for Violations of International Humanitarian Law (2003); *William H. Parks*, Command Responsibility for War Crimes, *Military Law Review* 62 (1973), 1-104; *Mirjan Damaška*, The Shadow Side of Command Responsibility, *American Journal of Comparative Law* 49 (2001), 455-496.

⁵³ See: Tokyo IMT Judgment, 48, 442-7; *US v. Karl Brandt et al. (The Doctors' Trial)* IV LRTWC 91-3. Keep the two originals, but add *The Prosecutor v. Ignace Bagilishema* (Appeal Judgement: Reasons), ICTR-95-1A-A, International Criminal Tribunal for Rwanda (ICTR), 3 July 2002, para.52

The fact that [crimes were] committed by a subordinate does not relieve his superior of criminal responsibility if he knew or had reason to know that the subordinate was about to commit such acts or had done so and the superior failed to take the necessary and reasonable measures to prevent such acts or to punish the perpetrators thereof.⁵⁴

This article has three major aspects, first, a superior/subordinate relationship; second, the “mental element”; and third, a failure to take reasonable measures to prevent or punish violations of international criminal law.⁵⁵ Importantly, it is an offence that can be proved by proof, not of giving orders, but by an omission, and does not even require proof that the leader knew of the offences, merely that he had reason to know or should have known of them. Notably, however, for civilians, the Rome Statute provides that the leader must have known, or “consciously disregarded information that clearly indicated” that crimes were being committed or about to be.⁵⁶ This raising of the *mens rea* requirement is unfortunate for cases against high-level government officials, leaving a loophole that they (alongside their usually expensive lawyers) are almost certain to seek to exploit.

The principle is an important one, but as, mentioned above, it is not without controversy. In its initial formulation, in the *Yamashita* case, one of its justifications was brought into the open, the court found that he either must have tolerated them, or secretly ordered them.⁵⁷ Some criticise this, on the basis that failures in evidence should not lead the development of new inculpatory doctrines.⁵⁸ This is true, but it must be remembered that the

⁵⁴ Article 7(3) of the International Criminal Tribunal for the former Yugoslavia (ICTY) Statute, Art. 6(3) of the International Criminal Tribunal for Rwanda (ICTR) Statute and Art. 6(3) of the Special Court for Sierra Leone (SCSL) Statute are essentially the same. Article 28 of the Rome Statute is slightly different, especially on the mental element required for civilian superiors and causation. The difference need not detain us here, however.

⁵⁵ *Delalić, Mucić, Delić and Landžo (Čelebići Camp)*, ICTY Judgment of the Court, IT-96-22-A, 11 November 1998, paras 344, 346; *Gerhard Werle*, *Principles of International Criminal Law* (2005), 136-137.

⁵⁶ Rome Statute, Article 28. This is not the customary position, see *Bagilishema* (Appeal Judgement, para.52).

⁵⁷ Trial of *General Tomoyuki Yamashita*, Law Reports of Trials of War Criminals (LRTWC) IV (1945), 34.

⁵⁸ *Kai Ambos*, Superior Responsibility, in: *Antonio Cassese et al.* (eds), *The Rome Statute for the International Criminal Court: A Commentary* (2002), 823.

doctrine is linked strongly to the duty of a superior to prevent international crimes over which he has control. A failure in this regard can be appropriately criminalised.⁵⁹

Nonetheless, as it stands, command responsibility is problematic, perhaps because it covers too many different forms of liability. It moves from knowing failures to intervene despite a duty, which is close to traditional complicity ideas, to, in essence, negligent dereliction of duty.⁶⁰ They are, simply speaking, very different things, a fact recognised by the German law relating to the subject, which deals separately with failure to know of offences in dereliction of duty, failure to report an offence, and knowing tolerance of offences when there is a duty and ability to intervene to prevent it. By treating all forms of command responsibility the same, the ICTY⁶¹ and the Rome Statute unfortunately distort the various concepts in a manner which “display[s] a measure of insensitivity to the degree of the actor’s own personal culpability”.⁶²

III. Joint Criminal Enterprise⁶³

Despite the prominence Command Responsibility is thought to have in leadership trials, the more frequent approach by the ICTY prosecutor, including in the *Milošević* case, is Joint Criminal Enterprise. This is a doctrine which was derived, not without controversy, from a few post-war

⁵⁹ See Robert Cryer, General Principles of Liability in International Criminal Law, in: Dominic McGoldrick et al. (eds), *The Permanent International Criminal Court: Legal and Policy Issues* (2004).

⁶⁰ For an extremely useful discussion of this matter, see: Damaška, *supra*, note 52, 460-471.

⁶¹ The ICTY has recently recast command responsibility in a different light, not as responsibility for the underlying crimes, but as a *sui generis* form of liability for the omission itself (This began in *Prosecutor v. Hadžihasanović*, Decision on Interlocutory Appeal Challenging Jurisdiction in Relation to Command Responsibility, IT-01-54-AR72, 16 July 2003, Dissenting Opinion of Judge Shahabuddeen, para.78; and (seemingly) achieved majority acceptance in: *Prosecutor v. Hadžihasanović and Kubura (Appeal Judgment)*, IT-01-47-A. International Criminal Tribunal for the former Yugoslavia (ICTY). 22 April 2008, para.39; but this is not how the principle has traditionally been seen, nor has it been so seen by the Rome Statute. See e.g. Christopher Greenwood, Command Responsibility and the *Hadžihasanović* Decision, *Journal of International Criminal Justice* 2 (2004), 598-605.

⁶² See, *supra*, note 52, Damaška, 456.

⁶³ This sub-section builds upon the relevant section of Chapter 15 of Cryer, Friman, Robinson & Wilmshurst, see *supra*, note 48, 304-307.

cases in the *Tadić* decision. It is a principle of liability which lies somewhere between conspiracy and aiding and abetting and covers three situations: “co-perpetration,”⁶⁴ where all participants in the common design possess the same criminal intent to commit a crime (and one or more of them actually perpetrate the crime, with intent).[...] so-called “concentration camp” cases,” and “type three” joint criminal enterprise, where crimes are committed by members of the group, outside its common purpose, but as a foreseeable incident of it.⁶⁵ It determined that all three types shared a common *actus reus*, namely that there was:

- i. A plurality of persons.
- ii. The existence of a common plan, design or purpose which amounts to or involves the commission of a crime provided for in the Statute.
- iii. Participation of the accused in the common design involving the perpetration of one of the crimes provided for in the Statute.⁶⁶

The mental element is probably where the controversy really comes in, it extends to

the *intention* to participate in and further the criminal activity or the criminal purpose of a group and to contribute to the joint criminal enterprise or in any event to the commission of a crime by the group. In addition, responsibility for a crime other than the one agreed upon in the common plan arises only if, under the circumstances of the case, (i) it was *foreseeable* that such a crime might be perpetrated by one or other members of the group and (ii) the accused *willingly took that risk*.⁶⁷

⁶⁴ Co-perpetration, as a separate principle of liability has recently become prominent in the ICC, *supra*, note 49.

⁶⁵ *Prosecutor v. Dusko Tadić (Appeal Judgement)*, IT-94-1-A, International Criminal Tribunal for the former Yugoslavia (ICTY), 15 July 1999, para.220; See also: *Sylvestre Gacumbitsi v. The Prosecutor (Appeal Judgement)*, ICTR-2001-64-A, International Criminal Tribunal for Rwanda (ICTR), 7 July 2006, Separate Opinion of Judge Shahabuddeen, para.40.

⁶⁶ *Id.*, para.227.

⁶⁷ *Id.*, para.228.

From the point of view of fairness to the defendant, the vague, “elastic” nature of the doctrine has led to claims that it is overbroad, thus reliant on prosecutorial discretion rather than law to keep it in check.⁶⁸ Fears have also been expressed about the extent to which it encourages prosecutors to bring indictments that assert joint enterprises in a very general manner, making preparation difficult for the defence.⁶⁹ Turning to the *mens rea*, a person can be convicted of specific intent crimes such as genocide even if that person did not have the relevant *mens rea* for that offence, but the crimes were a natural and foreseen incident of the enterprise he or she was involved in on the basis of joint criminal enterprise.⁷⁰ This has led to criticisms of joint criminal enterprise liability, as it allows the prosecution to circumvent the proper *mens rea* requirements for such serious crimes,⁷¹ especially as the ICTY considers Joint Criminal Enterprise as a form of perpetration rather than a separate principle of liability.⁷² The principle does go some way to describing the joint nature of many international crimes and explaining the culpability of some participants not otherwise easily brought under the ambit of criminality, in spite of their blameworthiness.⁷³

As can be seen, though, both of these ways which have been used in an attempt to circumvent the evidential problems that arise when prosecuting leaders and reflect the way in which they participate in international crimes. Despite their positive aspects, we also have to accept that they are not always used or interpreted with sufficient care with respect to the principle of individual culpability. This is only one example of Mark Osiel’s point that it is difficult to prosecute high-level offenders within a liberal framework⁷⁴ (although the difficulty is no reason not to prosecute, or to abandon a liberal framework for prosecution).

⁶⁸ Osiel, *The Banality of Good*, *supra*, note 52, 1799-1802.

⁶⁹ Guénaél Mettraux, *International Crimes and the ad Hoc Tribunals* (2005), 293.

⁷⁰ *Prosecutor v Brđanin*, Decision on Interlocutory Appeal, IT-99-36-A, 19 March 2004, para. 6.

⁷¹ Mettraux, *supra*, note 69, 265; Osiel, *The Banality of Good*, *supra*, note 52, 1796.

⁷² *Prosecutor v. Odžanić et al*, Decision on Motion on Jurisdiction-Joint Criminal Enterprise, IT-99-37-AR72, 21 May 2005, para. 20.

⁷³ Mettraux, *supra*, note 70, 292; Osiel, *The Banality of Good*, *supra*, note 52, 1786-1790, but see 1802.

⁷⁴ Mark Osiel, *Why Prosecute, Critics of Punishment for Mass Atrocity*, *Human Rights Quarterly* 22 (2000), 118, 123-125. See also: Darryl Robinson, *The Identity Crisis of International Criminal Law*, *Leiden Journal of International Law* 21 (2008), 925-963, 926.

D. Co-operation

I. Persuading the Perpetrators to Help

This leads to a large problem, that of obtaining both evidence and defendants.⁷⁵ Everything that has been said so far implies that the person concerned is actually already before the court and that there is (admissible) evidence against them. As is well-known, this is not always the case. The ICTY and ICTR both have strong powers to order compliance, whilst the ICC has somewhat weaker powers here.⁷⁶ Irrespective of the powers they have in theory, though, it is difficult to obtain people or evidence without some state co-operation, or a resort to irregular rendition (as occurred in a number of cases before the ICTY such as *Dokmanović*).⁷⁷ In this area, a sympathetic *locus delicti*, as Rwanda has, usually⁷⁸ proved in relation to Hutu defendants, means that co-operation is infinitely more likely to be forthcoming than in situations where it does not feel that it is in its interest to comply.⁷⁹

When a sitting head of State or high ranking government official (or someone with information about them) is being sought, the State is essentially certain to decide it is not, and to weather the costs. It is only after Milošević was deposed in the wake of local protests that he was handed over to the ICTY, and then only after a large IMF loan was mothballed until he was handed over. Similarly, it is unthinkable to Rwanda to co-operate with any investigations into the possible liability of high-ranking members of the new government, and it has even been alleged that attempting to initiate such investigations cost Carla del Ponte her job as Prosecutor of the ICTR.⁸⁰ Where the *locus delicti* is unwilling, co-operation coming from

⁷⁵ See generally: *Peskin's* excellent study, *supra*, note 3, *passim*.

⁷⁶ As can be seen, for example, by comparison of Articles 29 ICTY Statute (28 ICTR Statute) and Articles 86, 89 and 91 Rome Statute. See also: *René Blattmann & Kirsten Bowen*, Achievements and Problems of the International Criminal Court, *Journal of International Criminal Justice* 6 (2008), 711-730, 722-723.

⁷⁷ *Prosecutor v. Mrkšić Kvočka, Radić, Žigić and Prcać*, Decision on the Motion for Release by the Accused Slavko Dokmanović, IT-95-13a-PT, 22 October 1997.

⁷⁸ For an instance to the contrary see: *William A. Schabas*, *Barayagwiza v. Prosecutor*, *American Journal of International Law* 94 (2000), 563-571.

⁷⁹ See generally: *Rod Rastan*, Testing Co-Operation: The International Criminal Court and National Authorities, *Leiden Journal of International Law* 21 (2008), 431-456.

⁸⁰ *Luc Reydam*, The ICTR Ten Years On: Back to the Nuremberg Paradigm?, *Journal of International Criminal Justice* 3 (2005), 977-988, 978-979.

third States relies on the happenstance of the person or evidence being found in that State and the State being willing to co-operate with the relevant tribunal or requesting State. Sometimes, as in the *Pinochet* litigation,⁸¹ this is the case, at other times, such as with respect to Charles Taylor during his Nigerian exile, prior to the Liberian request that he be handed over to the Special Court, it is not.

The politics of co-operation are exceptionally important, and require the Prosecution to tread a fine line of ensuring that States remain friendly enough to the Court to co-operate, whilst safeguarding (real and perceived) prosecutorial independence and ensuring that crimes by all sides may be prosecuted.⁸² It is interesting that in this regard, the Prosecutor of the International Criminal Court has had very little luck obtaining any co-operation at all from Sudan in relation to the possibility of prosecuting high-level government officials, to the extent to which this fed in to his recent, and controversial, request for the an arrest warrant for the President Omar al-Bashir.⁸³

II. Immunities⁸⁴

This request itself brings us to the vexed question of immunities. Al-Bashir is a sitting head of State (as was Charles Taylor at the time of his indictment), and in relation to high level governmental officials (precisely

⁸¹ *Regina v. Bow*, Street Metropolitan Stipendiary Magistrate and others, ex parte Pinochet Ugarte (Amnesty International and others intervening) All England Law Reports 2 1999, 97. *Rosanne van Alebeek*, The Pinochet Case: International Human Rights Law on Trial, British Yearbook of International Law 71 (2000), 29-70, 69.

⁸² See: *Peskin*, supra, note 3; *Steven Roper & Lillian Barria*, State Co-operation and the International Criminal Court: Bargaining Influence in the Arrest and Surrender of Suspects, Leiden Journal of International Law 21 (2008), 457-476, 457; *William Burke-White*, Bargaining for Arrests at the International Criminal Court: A Response to Roper and Barria, Leiden Journal of International Law 21 (2008), 477-482, 477.

⁸³ See: e.g., Sixth Report of the Prosecutor of the International Criminal Court to the UN Security Council Pursuant to UNSCR 1593 (2005) 5 December 2007 paras 3, 6; Public Redacted Version of the Prosecutor's Application Under Article 58 Filed on 14 June 2008, ICC02/05, 12 September 2008, especially paras 411-2. For a very useful explanation of the context of this action see: *Alex de Waal*, Darfur, the Court and Khartoum: The Politics of State Non-Cooperation, in: *Nicholas Waddell & Phil Clark* (eds), *Courting Conflict: Justice, Peace and the ICC in Africa* (2008), 29.

⁸⁴ For a recent detailed study see: *Rosanne van Alebeek*, The Immunity of States and Their Officials in International Criminal Law and International Human Rights Law (2008).

which ones remains a matter of debate),⁸⁵ as the ICJ reaffirmed in the *Yerodia* case,⁸⁶ they retain their personal immunity before courts (especially national courts) even when there are allegations of international crimes. There is an exception to this, such persons do not retain their immunity before “certain international tribunals”. The ICTY and ICTR are clearly covered by this, as, according to Article 27 of the Rome Statute, is the ICC. This exception was controversially interpreted by the Special Court for Sierra Leone in the Taylor case to include that Court, even though its basis was a treaty between the UN and Sierra Leone, to which Liberia was not a party.⁸⁷

Normally, though the personal immunity of high level governmental officials extends, absent any special applicable provision to the contrary, to arrest and detention for the purpose of arrest or transfer to international tribunals. The ICTY and ICTR are exceptions to this, but this can be put down to the fact that their Statutes were passed by Security Council Resolutions (827 and 955 respectively), under Chapter VII, and which, by virtue of Article 103 of the UN Charter, trumps those immunities. For parties to the Rome Statute, it is broadly accepted that parties have waived their immunity before foreign courts for the purposes of co-operation with the Court. For non-State parties, however, Article 98(1) of the Rome Statute requires State parties not to violate the immunities accepted in international law.⁸⁸ All of which renders obtaining co-operation in the surrender of high-ranking officials even harder, although it ought not be forgotten that there are good reasons for personal immunities.⁸⁹

It is, of course, the case that ex-leaders (and, of course, rebels or other erstwhile allies who have fallen from favour), do not have immunity, either before domestic courts or international tribunals. This is perhaps the closest

⁸⁵ See, e.g. Colin Warbrick, Current Developments, Public International Law, Immunity and International Crimes in English Law, Comment on Mofaz, International and Comparative Law Quarterly 53 (2004), 771-774.

⁸⁶ *Arrest Warrant of 11 April 2000 (Democratic Republic of Congo v Belgium)*, I.C.J. Reports 2002, 3-35.

⁸⁷ *Prosecutor v. Taylor*, Decision on Immunity from Jurisdiction, SCSL-2003-01-I-A, 31 May 2004, paras 43-59.

⁸⁸ See further: Cryer, Friman, Robinson & Wilmschurst, *supra*, note 48, Chapter 20.

⁸⁹ For (good) arguments to the effect that Al-Bashir and other Sudanese officials would not be covered by this see: Dapo Akande, The Bashir Indictment: Are Heads of State Immune From ICC Prosecution?, Oxford Transitional Justice Research Working Paper, available at <http://www.csls.ox.ac.uk/documents/Akande.pdf> (last visited 8 December 2008).

that international criminal law can come to balance impunity and stability (on which more later), but, it has its own problems. First, it gives those in power a reason to cling on to it. Second, and related to this, as the *Milošević* case showed at the international level, and at least arguably the *Pinochet* precedent evidenced domestically,⁹⁰ the longer a person can avoid arrest, the less likely they are to be fit enough to face the type of justice that does not rely on the existence of a perfect metaphysical realm.⁹¹ As Hilaire McCoubrey made clear, old age is no legal or moral defence to international crimes,⁹² but procedurally, it is a more difficult to ensure trials for a defendant who has been immune for a many years. After all, here we are talking of leaders who may have been in power for more than twenty years, and may not have been in the first flush of youth in when they ascended to high office. In addition, time can fade witnesses' memories.

Finally, there is another problem. This relates to the fact that it is, for a variety of reasons, easier for a prosecutor, given the relevant rules on immunity (when added to the difficulties related to obtaining State co-operation) to proceed against those who do not have such immunity or political bars related to prosecution. This is understandable, since co-operation in relation to such suspects at least ought to be easier to obtain. This, in the short term, may seem like a good idea. Those who are not covered by immunity or political patronage might be thought to be a more ready sense of defendants, and thus work, for any court or tribunal seeking to establish its own legitimacy (and justify its continued existence (and budget)). Still, this runs the risk of appearing to be taking sides in conflicts, in particular, on the government side, a criticism that has been made of the ICC Prosecutor already.⁹³

⁹⁰ There are those who were unconvinced that Pinochet was really unfit to stand trial, but this must remain a matter of conjecture.

⁹¹ As *Sluiter* notes, the fact that Radovan Karadžić has claimed he is in good health gives grounds for "modest optimism". *Göran Sluiter, Karadžić on Trial: Two Procedural Problems*, *Journal of International Criminal Justice* 6 (2008), 617-626, 618.

⁹² *Hilaire McCoubrey, The Concept and Treatment of War Crimes*, *Journal of Armed Conflict Law* 1 (1996), 121-139, 133.

⁹³ *William A. Schabas, Prosecutorial Discretion v. Judicial Activism and the International Criminal Court*, *Journal of International Criminal Justice* 6 (2008) 731-761, 751-753.

E. Peace v Justice: The Old, Hard, Chestnut

Such considerations lead us to a, perhaps the, central problem that has plagued the ICC with respect to its early situations. This is the well-known, and frequently referred to Peace v Justice “paradox”. When it comes to the law, some, such as Geoffrey Robertson, the ex-president of the Special Court for Sierra Leone, have gone as far as to say that international law has developed to the level that although at times amnesties for lower level offences may be granted, there is a current norm prohibiting any amnesty for those at the top level.⁹⁴ This may (in relation to crimes not covered by treaty based obligations to prosecute) be *lex ferenda* rather than *lex lata*.⁹⁵ The accurate position was restated by the Special Court for Sierra Leone in the *Kallon and Kamara* decision, “that there is a crystallising international norm that a government cannot grant amnesty for serious violations of crimes under international law is amply supported by materials placed before the Court [but the view] that it has crystallised may not be entirely correct [...] it is accepted that such a norm is developing under international law”.⁹⁶ In any event, as Louise Mallinder has noted, “amnesties for both international and non-international crimes continue to be a political reality in the modern world”.⁹⁷

As a preliminary matter, it must be noted that this is not the place in which the problems of peace and justice are going to be given a solution, but there are a few relevant points that ought to be borne in mind. The first of these is that those most likely to be in a position to demand amnesty as a price for laying down their arms (or leaving power), are leaders, and that at times amnesties for such people are taken seriously. It cannot be ignored that just prior to the Iraq war, Saddam Hussein was offered some form of

⁹⁴ *Prosecutor v. Kondewa*, Decision on Lack of Jurisdiction/Abuse of Process, Amnesty Provided by Lomé Accord, SCSL-2004-14-AR72(E), 25 May 2004, Separate Opinion of Justice Robertson, paras 32-34.

⁹⁵ Although for modern arguments that amnesties are now prohibited in international law, see *Lisa J. Laplante*, *Outlawing Amnesty: The Return of Criminal Justice in Transitional Justice Schemes*, *Virginia Journal of International Law* 49 (forthcoming 2009).

⁹⁶ *Prosecutor v. Kallon and Kamara*, Decision on Challenge to Jurisdiction: Lomé Accord Amnesty, SCSL-2004-15-AR72(E) & SCSL 2004-16-AR72(E) 13 March 2004, para.82.

⁹⁷ *Louise Mallinder*, *Amnesty, Human Rights and Political Transitions: Bridging the Peace and Justice Divide*, 1st ed. (2008), 404.

amnesty,⁹⁸ and the issue has risen again very strongly in relation to the possible arrest warrant that is pending before a Pre-Trial Chamber of the ICC for the Sudanese President Omar al-Bashir. This latter process has led to considerable international comment. Entirely unsurprisingly, it led to howls of protest from Sudan,⁹⁹ raising arguments about neo-imperialism,¹⁰⁰ but also with none-too veiled threats to the peace process. Sudan argued that the peace in the North-South conflict, as well as peace in Darfur rested on a knife edge, and that any such indictment would undermine those peace processes. As a result, there have been suggestions that the Prosecutor has over-reached himself, and that the Security Council ought to, at least, defer any further action in relation to al-Bashir.

Most notably, following the Prosecutor's issue of the request to the Pre-Trial Chamber the African Union issued a communiqué in which they requested the Security Council to issue a request under Article 16 of the Rome Statute for proceedings with respect to al-Bashir to be deferred.¹⁰¹ This request was noted by the Security Council in Resolution 1828 (31 July 2008), with language that was by no means clear:

Taking note of the African Union (AU) communiqué of the 142nd Peace and Security Council [...] [which asked the Security Council issue a deferral request compliant with Article 16 of the Rome Statute] [...] *having in mind* concerns raised by members of the Council regarding potential developments subsequent to the application of the Prosecutor of the International Criminal Court of 14 July 2008, and *taking note* of their intention to consider these matters further [...].¹⁰²

⁹⁸ Michael P. Scharf, From the eXile Files: An Essay on Trading Justice for Peace, Washington and Lee Law Review 63 (2006) 339-378, 340.

⁹⁹ See Simon Tisdall, Man blamed for Darfur crisis says "I am in peace with myself", The Guardian (4 December 2008) 28-29.

¹⁰⁰ This is not to say that such arguments are justified, but they are not without resonance for many.

¹⁰¹ Art. 16 Rome Statute reads: "No investigation or prosecution may be commenced or proceeded with under this Statute for a period of 12 months after the Security Council adopted under Chapter VII of the Charter of the United Nations, has requested the Court to that effect; that request may be renewed by the Council under the same conditions."

¹⁰² SC Res. 1828, 5947th mtg., SC UN Doc. S/RES/1828 (31 July 2008), 2.

Sudan seemed pleased with this outcome, its representative at the Security Council asserting that:

The Security Council should provide [...] cooperation; give highest priority to the peace process; and allay all threats to the process, such as the measure undertaken by the Chief Prosecutor of the International Criminal Court (ICC) [...]. The African Union is not a foreign element; in fact, it is an inherent partner in all matters related to Darfur. In commending the role of the African Union, the principal partner in all issues concerning peace and stability of Darfur, we also commend the very important adoption by the African Union, at the emergency ministerial meeting of its Peace and Security Council at Addis Ababa, of a resolution that seeks to rise above the impediments and complexities created by the unfortunate and tragic action taken by the Chief Prosecutor of the ICC against one of the greatest leaders of the African continent, who has put an end to the longest-running conflict there and brought about peace between the South and the North of the Sudan. [...] We should move beyond the measure taken by the Chief Prosecutor, which is a recipe for destruction and ruin and poses a catastrophic danger to the stability, security and unity of the Sudan, the region as a whole and even the entire African continent.¹⁰³

The language, vague though it was, led the US, rarely the ICC's greatest supporter, to abstain from the vote on this resolution and to express its displeasure at the possibility of the Council deferring any proceedings by virtue of Article 16 of the ICC Statute, as it "would send the wrong signal to Sudanese President Al-Bashir and undermine efforts to bring him and others to justice".¹⁰⁴ It is true that the African Union is the UN's partner on the

¹⁰³ Meeting Record, 5947th mtg., SC UN Doc. S/PV.5947 (31 July 2008), 12.

¹⁰⁴ *Id.*, 12; See also the statement by Belgium, *Id.*, 10, that: "The Sudan's obligations and responsibilities in Darfur are clear. They have been set out in all previous resolutions, as well as in this one. Belgium will continue to work in the Security Council to ensure respect by the Sudan for all Council resolutions. We owe it to the population of Darfur, but we also owe it to the cause of international justice". This statement is itself an interesting example of what Frédéric Mégret has described as the emancipation of international criminal justice from narrow focuses on peace and security, see *Frédéric Mégret*, *The Special Tribunal for Lebanon: The Security Council and the*

ground in Darfur, and its views are worthy of respect. However, this does not mean that al-Bashir is in fact the force for peace he claims to be.¹⁰⁵ The Darfur conflict has been ongoing for over five years now, and al-Bashir has a vested interest (as do most leaders) in placing themselves in the role of the necessary part of the peace process.¹⁰⁶ As was said in a slightly different context,

Washington's efforts to downplay Milošević's culpability in war crimes in order to make him a palatable partner matched Milošević's own efforts. The Serbian leader was often careful to keep diplomatic channels open and appear committed to reach a negotiated solution. Milošević had an uncanny ability, Power notes, of cultivating the impression from the very start that of the conflict that "peace was right around the corner". Milošević's personal charm, fluent English, and ability to present a moderate image helped drive Western diplomats' wishful thinking about his true intentions.¹⁰⁷

There is more than a little to this, indeed, in some instances it may even be the case that some level of continued instability is quite conducive to their continuation in power. When questions of peace and justice are spoken of, the interests of the actors in portraying themselves as the peacemakers (whether they can or are taking on that role) must not be forgotten.

In this regard it ought to be also noted that interests can be more than simply political. Many leaders responsible for crimes (or their supporters) may also have personal interests in protecting themselves and their friends from investigation and prosecution. As was well explained by Steven Ratner in relation to the politics of the Cambodian situation:

Hun Sen wished to protect certain members of his government who had once been leading Khmer Rouge offenders who might

Emancipation of International Criminal Justice, *Leiden Journal of International Law* 21 (2008) 485-512, 485.

¹⁰⁵ *BBC News*, Sudan Declares Darfur Ceasefire (12 November 2008), available at <http://news.bbc.co.uk/2/hi/africa/7724220.stm> (last visited 8 December 2008).

¹⁰⁶ *Multi NGO report*, Rhetoric v. Reality: The Situation in Darfur (December 2008) available at http://www.hrw.org/sites/default/files/related_material/darfur1208.pdf (last visited 8 December 2008).

¹⁰⁷ See: *supra*, note 3, *Peskin*, 37.

well face trial. Second, Hun Sen had made certain deals with ex-Khmer Rouge leaders, including senior 1970s-regime leaders Ieng Sary, Khieu Samphan and Noun Chea, granting them *de facto* (and, in Ieng Sary's case, *de jure*) amnesty in exchange for their political support. He did not wish to renege on these deals and argued that they were necessary to prevent a return to civil war. In fact, we found no evidence of any support for these ex-Khmer Rouge leaders from their former cadres and no danger that they could mobilise actions against the government. The deals may well have been financial in nature, involving mutual respect of the spheres of influence of Hun Sen and the ex-Khmer Rouge, as each seeks to engage in off-the-books illegal mining and timber gathering.¹⁰⁸

Finally, given that indictments can also serve to affect the relative position of parties, it may simply be that predictions about the impact of indictments on peace are very difficult.¹⁰⁹ As such, it is an area in which even realists (or those who consider themselves such) need to tread carefully, and evaluate all the evidence more carefully than simply accepting at face value the participants' assertions.¹¹⁰ This is not to say some people are not, or cannot be peacemakers, but their statements are to be treated with caution. After all, the Dayton talks worked without Karadžić.

¹⁰⁸ Steven Ratner, Chair of the United Nations Group of Experts for Cambodia, in: Timothy L. H. McCormack & Cheryl Saunders (eds), *Sir Ninian Stephen: A Tribute* (2007) 206-219, 211.

¹⁰⁹ See the exchange of views on point in: *Stephen Oola*, Bashir and the ICC: The Aura or Audition of International Justice in Africa? (15 October 2008), Oxford Transitional Justice Research Working Paper available at <http://www.csls.ox.ac.uk/documents/OolaFin.pdf> (last visited 8 December 2008) (*Bashir and the ICC*); *Lutz Oette*, Another Piece in the Puzzle: Accountability and Justice for International Crimes in Sudan (20 August 2008), Oxford Transitional Justice Research Working Paper available at <http://www.csls.ox.ac.uk/documents/OetteFi.pdf> (last visited 8 December 2008); *Yvonne Malan*, The Force of Law and the Problem of Impunity (28 July 2008), Oxford Transitional Justice Research Working Paper available at <http://www.csls.ox.ac.uk/documents/Malan.pdf> (last visited 8 December 2008); *Phil Clark*, If Ocampo Indicts Bashir, Nothing May Happen (13 July 2008), Oxford Transitional Justice Research Working Paper, available at http://www.csls.ox.ac.uk/documents/Clark_Final.pdf (last visited 8 December 2008).

¹¹⁰ See in particular: *Susan Dwyer*, Reconciliation for Realists, *Ethics and International Affairs* 13 (1999) 81-98, 83-84.

The prosecutor, who has been criticised for playing politics at times, has recently been taking great pains to say that amnesties and the like, are not really part of his remit, opining (with respect to choice of situations):

The Statute provides a clear framework to select situations and cases to investigate. [...] I have to apply the law. Nothing more, nothing less. The decision that ending impunity will endure lasting peace and security was taken in Rome. I should not, and I will not take into account political considerations.¹¹¹

Of course, politics can enter into the equation under the Rome Statute in two ways, the most direct way being by virtue of Article 16.¹¹² This, of course, provides for the Security Council to cause the Court to defer investigations or proceedings for a (renewable) one year period. The factors that may militate in favour of amnesty however, are for the Security Council to appraise, and only if there is sufficient agreement in the Council for a resolution requesting deferral. This in itself is quite a high threshold. What is perhaps most interesting about Article 16 is that it means that the process can only be deferred (and only for as long as the Security Council continues to issue yearly resolutions). Accountability cannot be bargained away in a quiet, or permanent, manner if the ICC has jurisdiction and the Prosecutor becomes involved. This, in itself, is a shift in international relations.

It is true that the Prosecutor, when exercising his discretion under Article 53 of the Statute, may take into account the concept of the “interests of justice”, which gives some elbow room for him to decline to become involved in certain circumstances. This could include a situation in which an amnesty is being negotiated or has been granted.¹¹³ However, as he has made clear, and was noted above, where here is a basis to believe that

¹¹¹ *Luis Moreno-Ocampo*, Address to the Assembly of States Parties, 14 November 2008, 2-11, 6. This provides an interesting return to the initial position adopted in the OTP, see: *Benjamin J. Schiff*, Building the International Criminal Court (2008) 111-115.

¹¹² See generally: *Morten Bergsmo & Jelena Pejić*, Article 16, in: *Otto Triffterer* (ed.), Commentary on the Rome Statute: Observers' Notes, Article by Article, 2nd ed. (2008).

¹¹³ *Michael Scharf*, The Amnesty Exception to the Jurisdiction of the International Criminal Court, Cornell International Law Journal 32 (1999) 507-528, 507-508; *Darryl Robinson*, Serving the Interests of Justice: Amnesties, Truth Commissions and the International Criminal Court, European Journal of International Law 14 (2003) 481-505, 483-488.

crimes under the jurisdiction of the Court have been committed, prosecution is meant to be the default option. The Prosecutor has taken the view, understandably, given the upshot of the Rome Statute, that it is only in truly exceptional situations that the interests of justice ought to lead him not to pursue prosecutions. Furthermore, as has been said by the Prosecutor, the interests of justice are not necessarily the same as the interests of peace.¹¹⁴ Although this does undermine in a small way his assertion that the role of the Prosecutor is an entirely apolitical one, in itself, the idea that the default position is prosecution is a positive step. On top of this, if a State or the Security Council referred the matter to the Prosecutor, then a decision not to proceed with an investigation, any decision of the Prosecutor not to proceed is subject to review by a pre-Trial Chamber.¹¹⁵ The fact that such discretion is subject to judicial review is, again, important, insofar as it ensures that any decision on point is transparent.¹¹⁶

F. The Practical Problems

I. Prosecution Strategy

Even if a leader finds their way to the dock, there is another practical issue, which has recently arisen with respect to the trials of Slobodan Milošević and Saddam Hussein. This is the ambit of the indictment. Should the prosecutor move to indict a person, as the OTP of the ICTY did with charges that span the entire set of crimes for which they are thought to bear responsibility, or proceed, as the Prosecution in the Saddam Hussein proceedings did, and attempt to focus on one or more easy cases?

Both strategies have their advantages. The idea of the large indictment, which of course was the approach taken by the Nuremberg and Tokyo International Military Tribunals. These have the advantage, if it is one, of being able to provide a large narrative of the conflict(s-) as a whole, and one of the asserted benefits of criminal trials is that they help combat denial (and some go further to say promote reconciliation) by subjecting the facts to forensic scrutiny.¹¹⁷ They also, where the charges are adequately

¹¹⁴ International Criminal Court - Office of the Prosecutor, Policy Paper on the Interests of Justice (September 2007) 1-9, 1.

¹¹⁵ Art. 53(3) Rome Statute.

¹¹⁶ It must be admitted though that not all of the early ICC practice is defensible on point.

¹¹⁷ *E.g.*: Mark Osiel, *Mass Atrocity, Collective Memory and the Law*, 1st ed. (1997).

proved, provide, so far as is possible, for retribution at the appropriate level to the offences committed. This is linked to the idea that all the person's victims will be given some satisfaction and have their suffering recognised. It also has the advantage of treating all the charges together, and in instances of crimes against humanity and, to some extent, genocide, where the contextual elements are of the essence in proving the charges, litigating broader aspects of the conflicts can be important.

Nonetheless, there are pitfalls to this, it can lead to long, unwieldy trials, and give large leeway to the defence for dilatory tactics, either to delay proceedings excessively, or in the hope that the Tribunal will react in a manner that can be turned to their advantage and such that they can claim violations (sometimes justified) of breaches of fair trial rights.¹¹⁸ In addition, since leaders are often advancing in years by the time they reach trial there is always the risk of their death during the trial, which leaves a taste of futility in the mouths of many. It also encourages prosecutors to issue indictments which mix charges which are not as supported as others, and each acquittal serves to undermine part of the narrative that the prosecution was seeking to set up.¹¹⁹ As noted above, there are inculpatory doctrines specific to international crimes which deal in some way with evidential problems, but they are risky, if they are expanded too broadly, they ignore culpability, and will be subjected to critique.

The virtues of the smaller charge, with the possibility of further charges later, approach are largely the converse of the critiques of the larger trial, they are comparatively simple, quick, and easy to run. The prosecutor in this instance is likely to investigate a number of different incidents, and begin with the case which is the strongest. This is what happened in the *Dujail* trial. Still, they are not free from problems, the first being it can only partially reflect what the person is suspected of doing, and cases like *Dujail* tend to be chosen not because they are especially representative, or comparatively serious, but because the prosecutor knows that he or she is going to be able to prove it. As a result, only a small part of the overall story

¹¹⁸ See, generally: Göran Sluiter, Karadžić on Trial: Two Procedural Problems, *Journal of International Criminal Justice* 6 (2008) 617-626; Marko Milanović, The Arrest and Impending Trial of Radovan Karadžić, *International and Comparative Law Quarterly* 58 (forthcoming 2009); Michael P. Scharf, Chaos in the Courtroom: Controlling Disruptive Defendants and Contumacious Counsel in War Crimes Trials, *Case Western Reserve Journal of International Law* 39 (2006-2007), 155-170; It cannot be forgotten that leaders are used to manipulating processes and posturing, and are often good at it, at least in the eyes of many in their intended (usually home) audiences.

¹¹⁹ On all the above aspects, see, for example, *Boas supra* note 3.

gets told, and many victims will not have their tales told. It is true that there may be the possibility of further trials, but, where, as with the Saddam trial, the person is sentenced to death, this is impossible. In this particular case this means that the Kurds and the Iranians, as well as the Kuwaitis and Coalition personnel who were mistreated in 1991 will never see Saddam stand trial for offences against them. Even where this reprehensible punishment is not imposed, further trials will probably take a long time, longer than even a large trial is likely to, as the process has to go through all the relevant stages again.

Given the problems of both of these, it must be said, a prosecutor is offered a difficult choice, and is in some ways caught on the horns of an almost insoluble dilemma. Perhaps the best way forward is to try at least to deal with a manageable number of representative instances, where the evidence is strong. Fortunately, since the death penalty is unavailable in the International Criminal Court, the problem of killing the defendant before the possibility of further trials is, at least, excluded.

G. Conclusion

The above may sound rather negative. If so, it must be emphasised that it is not intended to be, similarly nor is it counsel in favour of not attempting to prosecute leaders. It is precisely the opposite. The swing towards justice is an exceptionally important legal (and moral) development, and just as something is difficult does not mean that it ought not to be pursued with vigour. It is worth, however, doing so with an awareness of the possible pitfalls that such prosecutions face. It is only by facing such problems that progress can be made.

In a statement released just after the Rome Conference, Amnesty International averred that:

[t]he true significance of the adoption of the statute may well lie, not in the actual institution itself in its early years, which will face enormous obstacles, but in the revolution in legal and moral attitudes towards the worst crimes in the world. No longer will these crimes be simply political events to be addressed by diplomacy at the international level, but crimes which all states have a duty to punish themselves, or, if they fail to fulfil this

duty, by the international community in accordance with the rule of law.¹²⁰

This statement sums up a great deal of the importance of the ICC and international criminal law in general. Recent practice, including the creation of the ICC reflects, and contributes greatly to, a significant cultural turn to accountability for those crimes which are universally condemned. Fifteen years ago, most of those accused of international crimes could sleep soundly, fairly sure that they would not be required to stand trial for their conduct. It is unlikely that Augusto Pinochet or Hissene Habré thought that international law would impinge upon their dotage. Both of them, to different extents, have been proved wrong, even if, on the basis of what had occurred since Nuremberg and Tokyo, their opinion had an empirical basis. If nothing else, we are now in the situation where ex-statespeople who have been complicit (or more) in international crimes may have to reassess their situation.

The criticism of the ICC that it is causing leaders to fear prosecution, and thus cling on to power rather than possibly face a flight to the Hague¹²¹ may, optimistically, be viewed as the growing pains of international justice, and that the next generation of leaders, rather than committing crimes then fearing prosecution, might think twice before committing international crimes, and prevention is better than cure. Some will, nonetheless, commit such crimes, the lure of the end justifying the means is a siren song that too often proves irresistible.¹²² But criminal law can never eradicate crime, and if fewer leaders succumb to this temptation, international criminal justice will have proved itself worthwhile.

¹²⁰ Quoted in: *William Pace & Mark Thieroff*, Participation of Non-Governmental Organizations, in: *Roy S. Lee* (ed.), *The International Criminal Court: The Making of the Rome Statute* (1999) 391-398, 396.

¹²¹ See *supra*, note 123, *Oola*, Bashir and the ICC.

¹²² For a judicial position coming close to this, see: *Prosecutor v. Fofana and Kondewa*, Judgment, SCSL-04-14-A, 28 May 2008, Partially Dissenting Opinion of Judge George Gelaga King, paras 26-31 & 90-94.

